

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWIGHT ROBERSON,

Defendant-Appellant.

UNPUBLISHED

June 8, 2010

No. 291436

Wayne Circuit Court

LC No. 08-014529-FH

Before: K.F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of first-degree home invasion, MCL 750.110a(2), second-degree home invasion, MCL 750.110a(3), receiving or concealing stolen property valued between \$200 and \$1,000, MCL 750.535(4)(a), malicious destruction of a house, causing damages between \$1,000 and \$20,000, MCL 750.380(3)(a), and participating in a criminal enterprise, MCL 750.159i. The trial court sentenced defendant, as a second habitual offender, MCL 769.10, to concurrent terms of 20 to 30 years in prison for the first-degree home invasion and criminal enterprise convictions, 10 to 15 years for the second-degree home invasion conviction, two to five years for the malicious destruction conviction, and time served for the receiving or concealing conviction. Defendant appeals as of right. We affirm.

The prosecutor charged defendant and four codefendants¹ with participating in four Detroit robberies: breaking and entering Your Place Lounge located at 17326 East Warren early on August 31, 2008, invading a residence on Woodhall Street on September 27, 2008, and robbing two other Woodhall Street residences on September 29, 2008. The robbery targets all were located within three blocks of one another.

Defendant undisputedly occupied a residence located at 4889 Woodhall Street, in the midst of the robbery targets.² Detroit police officers testified that they first investigated a

¹ In addition to defendant, the prosecutor charged Delvonne Roshad Randall, Brandon Joshua Pitts, Shawntez Eric Cobb, and Thomas Ezel Copeland.

² Police testimony at trial agreed that 4889 Woodhall lacked electric, gas, or water meters, but had an illegal electricity hookup to the home next door.

potential connection between 4889 Woodhall Street and the robberies immediately after the August 31, 2008 breaking and entering of the lounge, to which 4889 Woodhall was the closest residence, immediately adjacent to the lounge across an alley. Officers observed suspect movement inside 4889 Woodhall, entered the house, found liquor, pieces of a cash register, and other items taken from the lounge, and arrested defendant and his four charged codefendants, who were released days later.

Several Woodhall Street residents testified about the robberies of their houses, and two residents recalled seeing four to six African-American males engaged in suspicious behavior on Woodhall Street in the early morning hours of September 29, 2008. The suspicious behavior included pushing a trash receptacle full of pipes down the sidewalk and carrying a large duffel bag, which items the group transported to 4889 Woodhall. The trash receptacle bore the address of one of the broken and entered homes. None of the Woodhall Street residents could identify defendant as one of the Woodhall home invaders. However, later on September 29, 2008, the police descended on 4889 Woodhall and arrested defendant and a codefendant as they tried to flee from the house; police arrested another codefendant inside the house. At the time of the arrests, the police found the trash receptacle containing copper piping stolen from one of the Woodhall Street houses, a Wii game system stolen from another Woodhall residence, and several other items of stolen property from the three invaded Woodhall homes.

I. CRIMINAL ENTERPRISE JURY INSTRUCTION

Defendant initially complains on appeal that the trial court deprived him of due process and a fair trial when it instructed the jury on an uncharged theory of criminal enterprise liability. At the close of the third day of trial, after the parties had rested, the trial court discussed with the parties the language it would employ to instruct the jurors regarding the elements of criminal enterprise liability under MCL 750.159i. The prosecutor eventually endorsed the instruction crafted by the trial court, although defense counsel advised the court that he would review the proposed instruction that evening “and see if I can figure out something that makes it fit better in my head.” When the next day of trial commenced, the court stated, “When we left yesterday I had asked you both if you wanted to improve on the jury instruction that I was going to give on Count 7. It’s my understanding that you can both live with the way I read [it] into the record yesterday,” and defense counsel replied, “Yes, your Honor.” Defense counsel’s affirmative expression of approval of the proposed criminal enterprise instruction amounts to a waiver of any appellate claim of error concerning the instruction, which extinguishes any instructional error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant additionally recasts his claim of criminal enterprise instructional error as a contention that he received ineffective assistance of counsel at trial. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews for clear error a trial court’s findings of fact, and considers de novo questions of constitutional law. *Id.* Because defendant did not previously challenge his trial counsel’s effectiveness, we limit our review of his claim to mistakes apparent on the existing record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

“[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant’s claim of ineffective assistance of counsel includes two components: “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” To establish the first component, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel’s errors the result of the proceedings would have differed. *Id.* at 663-664. The defendant must overcome the strong presumptions that his “counsel’s conduct falls within the wide range of professional assistance,” and that his counsel’s actions represented sound trial strategy. *Strickland*, 466 US at 689.

The charging documents filed by the prosecutor consistently charged defendant with a criminal enterprise violation of MCL 750.159i(1): “A person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity.” However, the trial court’s final jury instructions concerning criminal enterprise liability focused solely on a distinct theory delineated in MCL 750.159i(2): “A person shall not knowingly acquire or maintain an interest in or control of an enterprise or real or personal property used or intended for use in the operation of an enterprise, directly or indirectly, through a pattern of racketeering activity.” (Emphasis added).³ The trial court’s jury instruction essentially amended the terms of the prosecutor’s charging documents.

This Court generally reviews for an abuse of discretion a trial court’s decision to amend an information. *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005).

The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury . . . and to a reasonable continuance of the cause *unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made* or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day [MCL 767.76 (emphasis added).]

³ The trial court instructed the jury that the Michigan criminal enterprise statute “provides that a person shall not knowingly acquire or maintain property used or intended for use in racketeering activity by a criminal enterprise.” The trial court went on to read the jury the statutory definitions of “criminal enterprise,” “racketeering,” and “pattern of racketeering activity.”

“The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. . . .” MCR 6.112(H). “A trial court may amend the information at any time . . . as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime.” *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987); see also *People v Higuera*, 244 Mich App 429, 453; 625 NW2d 444 (2001). In summary, “an amendment must not cause unacceptable prejudice to the defendant through ‘unfair surprise, inadequate notice, or insufficient opportunity to defend.’” *People v McGee*, 258 Mich App 683, 688; 672 NW2d 191 (2003), quoting *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Here, the trial court’s instruction of the jury with respect to the elements of criminal enterprise responsibility pursuant to MCL 750.159i(2) did not charge defendant with a new crime, but merely a different theory of criminal enterprise liability than the prosecutor initially charged under MCL 750.159i(1). Furthermore, defendant cannot genuinely claim unfair surprise or other prejudice arising from the trial court’s jury instruction incorporating the elements of subsection (2). At the lengthy preliminary examination, the prosecutor presented much of the same evidence elicited at trial, including police officer testimony that on August 31, 2008 defendant was arrested at 4889 Woodhall Street in the presence of liquor bottles and the cash register stolen from the lounge, and that on September 29, 2008 he was arrested at 4889 Woodhall Street with a stolen cell phone in his pocket and other items stolen from the three targeted Woodhall Street residences sitting in and around 4889 Woodhall. The prosecutor summarized at the preliminary examination defendant’s participation in the criminal enterprise, in pertinent part as follows:

We have Mr. Roberson who is present immediately after the breaking and entering the bar. You have Mr. Roberson. You have Mr. Randall. You have Mr. Pitts all being present at the address of 4889 Woodhall, which is right behind the bar. Within the same hour that the alarm went off they’re tracked down by the blood trail of Mr. Randall. He’s the person bleeding when they get into that house, but the blood trail is followed to that location. It stops at the grass. But once they get in there they see Mr. Randall who is bleeding and they see all the stolen items from the bar at that location: the liquor bottles, the beer and the cash register.

* * *

The same goes for the location of the home invasions. Two of the home invasions happened the exact same night, September 29th of 2008, that’s at 4150 Woodhall and 4128 Woodhall. They happen in the same manner. The windows were pried open or broken and then items are missing and the back doors are either unlocked or open. I assume, if they got in through the window, opened the back door and left through that when they stole all the property.

Again, there’s no eyewitness testimony but there is certainly circumstantial evidence Mr. Pitts is found not only with Ms. Taylor’s cell phone within hours of that B and E, he fits the description the officers received from a witness and he also has the house keys of the victim on his person when he was arrested at a different location from everybody else. *Everybody else was*

arrested at that 4889 Woodhall, that being Mr. Roberson, Mr. Pitts [sic] and Mr. Copeland.

Mr. Copeland and Mr. Roberson had items on them specifically from the home invasions. Mr. Roberson had the cell phone of Ms. Taylor's

Also, at that location, I would say that they're acting in control of these items because the black duffel bag, which has the copper piping

You also have the item from 4303 Woodhall, the popcorn tin, which was pretty specific, Scooby-Doo popcorn tin, which had approximately \$600 worth of change in it, as well as the Nintendo Wii that Mr. Copeland had in the backpack along with the jewelry. *Everybody was arrested in that location and tied to that . . . [Emphasis added.]*⁴

From the time of the preliminary examination, defendant had reasonable notice that the manner in which the prosecutor intended to prove his criminal enterprise culpability for the breaking and entering and home invasions at least in large part rested on defendant's hosting of or association with his charged codefendants at 4889 Woodhall and the storage of stolen property there.

⁴ When the prosecutor gave his opening statement at defendant's trial, he similarly emphasized defendant's connection to 4889 Woodhall Street:

Mr. Roberson, you wouldn't find his DNA in any of the homes. You won't find his DNA inside that bar. You won't see a person who can put him inside any of those homes, okay. But he is an aider and abettor. Without him, without his location where he was staying this—but for him these cases would probably not have happened, okay.

You will hear that from every one of these events there was property stored and placed at 4889 Woodhall shortly after the event. And the police collected them within an hour for Your Place Lounge, within a couple of hours from the home invasions of Ms. Wilk and Ms. Peasie Taylor as well as two days afterwards for the home invasion of Mr. Andrae Taylor. All that evidence was collected inside of 4889 Woodhall Street, okay. . . .

* * *

For all those reasons, and for this evidence, looking at the group of co-conspirators who essentially run roughshod over a neighborhood over there on Woodhall Street, we'd ask you to find the defendant guilty as charged on all these counts. That is that he aided and abetted in all these home invasions, three of them, the breaking into the bar, and the receiving and concealing stolen property, storing it at his location when the police got there on both times

Moreover, the amendment in no way altered the nature of defendant's trial defense or the evidence supporting the defense. At trial, defendant denied any participation in the charged breaking and entering or home invasions, maintaining that he spent many days away from 4889 Woodhall Street in September 2008, and that when staying at 4889 Woodhall he was nearly always inebriated and never noticed any stolen property there. Defense counsel also highlighted the lack of physical evidence or eyewitness testimony tying defendant to any of the charged crimes. The chosen defenses applied with equal force irrespective whether the prosecutor pursued defendant's criminal enterprise conviction under MCL 750.159i(1) or (2). *McGee*, 258 Mich App at 688.

The trial court did not abuse its discretion to the extent it amended the information because (1) defendant faced the same criminal enterprise charge contained in the information, (2) he had reasonable notice of the potential applicability of a criminal enterprise charge under MCL 750.159i(2) stemming from his association with 4889 Woodhall, and (3) the amendment occasioned no prejudice to defendant's trial defense. Because no due process violation or fair trial deprivation occurred related to the trial court's jury instructions, defense counsel was not ineffective for failing to raise a groundless objection to the criminal enterprise instructions. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

II. PROSECUTORIAL MISCONDUCT

Defendant further avers that several instances of prosecutorial misconduct infringed on his right to a fair trial.

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). But appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *Schutte*, 240 Mich App at 720.

Defendant submits that the following portions of the prosecutor's cross-examination of defendant unfairly shifted to him the burden of proof at trial and improperly encroached on privileged communications with defense counsel:

Prosecutor: The—Mr. Randall and Mr. Copeland, you’ve had contact with them on the first day of trial, is that correct, in this case?

Defendant: Yes.

Prosecutor: Okay. Despite counsel telling this jury that Mr. Sparks may testify and you may testify, do you have some indication or suggest to your counsel that Mr. Randall and Mr. Copeland would testify?

Defendant: Yes.

* * *

Defense counsel: I guess I have to object on the grounds that I don’t know whether or not they’re going to testify or not. I don’t think. There’s privileges they have and so on. I haven’t mentioned that to the jury.

The Court: Well, that wasn’t really the question, though. We understand that we don’t know for sure whether they’re going to testify or not.

Defense counsel: That’s why I never brought before the jury. And obviously even my client shouldn’t be able to speculate on that.

The Court: Well, your client is being asked what . . . his understanding is with respect to these witnesses based on any conversations he’s had with them. I think that’s what—

Prosecutor: That’s correct, your Honor.

The Court: —counsel’s saying. Yeah. So that’s permissible.

Prosecutor: And you were the one having conversations with Mr. Copeland and Mr. Randall about them testifying; is that correct?

Defendant: Yeah.

* * *

Prosecutor: Okay. So you’re the one making the arrangements for that, right?

Defendant: Yes.

Prosecutor: Okay. And then you informed your attorney about that, right?

Defendant: Yes.

Given that defendant offered no objection to the prosecutor's inquiries on the ground that they shifted the burden of proof or infringed on his attorney-client privilege, we review these unpreserved claims only to determine whether any plain error affected defendant's substantial rights. *Schutte*, 240 Mich App at 720. We detect from the prosecutor's challenged questions no risk that any plain error affected the outcome of defendant's trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

With respect to defendant's burden of proof complaint, the prosecutor did nothing tending to unlawfully shift the burden of proof to defendant. Our Supreme Court summarized the relevant guiding principles when addressing a burden shifting contention like defendant's:

Our Court of Appeals has addressed on many occasions the claim that prosecutorial comment on the failure of the defendant to call corroborating witnesses "shifted the burden of proof." These published opinions of the Court of Appeals have consistently held that when a defendant advances an alternate theory or alibi, "the prosecution, by commenting on the nonproduction of corroborating alibi witnesses, is merely pointing out the weakness in defendant's case" and not "improperly shifting the burden of proof to the defendant." [*People v Shannon*, 88 Mich App 138, 145; 276 NW2d 546 (1979).]

* * *

In sum, prosecutorial comment that infringes on a defendant's right not to testify may constitute error. However, where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*People v Fields*, 450 Mich 94, 111-112, 115; 538 NW2d 356 (1995).]

Presumably, the prosecutor's inquiries of defendant whether he spoke to two codefendants about testifying meant to cast doubt on defendant's idea or intent to call these corroborating witnesses. But because defendant testified at trial and advanced "an alternate theory of the case that, if true would exonerate . . . [him]," the prosecutor's questions about potential testimony by his codefendants merely and properly intended to "comment on the validity of the alternate theory [and] cannot be said to shift the burden of proving innocence on the defendant." *Id.* at 115. Stated differently, because "the prosecutor's comments d[id] not burden . . . defendant's right not to testify, commenting on . . . defendant's failure to call a witness does not shift the burden of proof." *Id.* at 112. And defendant endured no conceivable prejudice in light of Copeland's and Randall's appearances at trial to testify for the defense,⁵ and the trial court's final instructions

⁵ Because Copeland testified at trial on behalf of the defense and Randall, whom defendant ultimately opted against calling, also appeared at trial to testify, we need not address defendant's suggestion on appeal that "[t]he prosecutor's misconduct in questioning Mr. Roberson about co-

that the prosecutor “must prove each element of the crimes beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything. In the end if you find the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.”

Regarding defendant’s criticism that the prosecutor intruded into the attorney-client relationship between defendant and defense counsel, defendant specifically suggests as improper the above-quoted inquiry about whether defendant had advised defense counsel to call his codefendants as witnesses, and also the following cross-examination questions:

Prosecutor: The—and, sir, you provided your attorney with the information that you had no money?

Defendant: Yes.

Prosecutor: At the time of either arrest; is that correct?

Defendant: Yes.

Prosecutor: You didn’t tell counsel about your tape when you talked to your buddy about the \$200, getting that out of your house, did you?

Defendant: That was like about—I was locked up about a week and a half after when I made that phone call.

Prosecutor: Okay. You never told your attorney about that; is that right?

Defendant: No. Wasn’t any money there in my house.

Defendant also points out that the prosecutor again referenced this improper topic in his closing argument when he noted, “But the defendant didn’t tell his attorney about that tape from jail about the money, okay. The defendant didn’t tell the—well strike that.” In light of defendant’s failure to object to any of these additional, alleged instances of prosecutorial misconduct at trial, we also review these claims to determine whether any plain error affected defendant’s substantial rights. *Schutte*, 240 Mich App at 720.

“A prosecutor should not question a defendant regarding conversations with his or her attorney, as the attorney-client privilege is fundamental to our system of jurisprudence and the privilege is destroyed if improper inference can be drawn from its exercise.” *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007) (internal quotation omitted). The prosecutor did elicit that defendant spoke with defense counsel about potential testimony by two codefendants and not having any money; however, the audio-recorded phone call references in the prosecutor’s last three above-quoted questions and the closing argument excerpt did not broach

(...continued)

Defendants and potential witnesses Randall and Copeland was particularly egregious because had either . . . asserted his Fifth Amendment privilege against self-incrimination, Mr. Roberson could not force him to testify.”

“[t]he substance of any confidential communications.” *Id.* The prosecutor’s inquiry whether defendant told his counsel he had no money, and the follow-up inquiries concerning the audio-recorded phone call, responded to an essential component of the defense theory of the case, which defense counsel had elicited on direct examination of defendant, namely that defendant never possessed any proceeds from the charged crimes. In conclusion, while improper, the three questions of the prosecutor that yielded testimony about the content of communications between defendant and defense counsel did not affect the outcome of defendant’s trial, considering the brief and isolated nature of the prosecutor’s improper questions and the wealth of properly admitted evidence incriminating defendant in the criminal enterprise involving the breaking and entering and home invasions.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher